No. 95-809

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

LOCKHEED CORPORATION, et al.
Petitioners,
vs.
PAUL L. SPINK,
Respondent

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE ERISA INDUSTRY COMMITTEE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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BRIEF OF THE ERISA INDUSTRY COMMITTEE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

The ERISA Industry Committee ("ERIC") submits this brief *amicus curiae* supporting Petitioners. This brief addresses solely the question whether Lockheed engaged in a transaction prohibited by section 406 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1106, when it amended its pension plan to offer enhanced retirement benefits to eligible employees who agreed to waive certain employment-related claims.

The parties have consented to the filing of this brief. Correspondence reflecting the parties' consent has been lodged with the Clerk.

INTEREST OF *AMICUS CURIAE*

ERIC is a non-profit organization representing over 120 major employers, virtually all of whom maintain defined benefit pension plans governed by ERISA and who therefore could be affected the Court's decision in this case. ERIC frequently participates as *amicus curiae* in cases with the potential for far-reaching effects on employee benefit plan design or administration.[1] ERIC previously joined in a brief *amici curiae* in support of Petitioners' Petition for Writ of Certiorari.

Because the Court's decision in this case is likely to determine the lawfulness of many popular early retirement programs, and to determine the enforceability of the many thousands of releases that have been executed in recent years by retiring employees in exchange for enhanced early retirement benefits under their employers' retirement plans, ERIC has a profound interest in the resolution of this case. ERIC's interest in this case also is based on the likelihood that the Court's decision will have a significant effect on the lawfulness of many other commonplace employee benefit arrangements entered into by employers and employees throughout the country.

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[1] *See, e.g., New York State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 115 S. Ct. 1671 (1995); *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223 (1995); *Patterson* v. *Shumate*, 504 U.S. 753 (1992); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989); *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58 (1987); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); *International Bhd. of Teamsters* v. *Daniel*, 439 U.S. 551 (1979).

SUMMARY OF ARGUMENT

The Court should reverse the court of appeals' decision below.

The court of appeals' application of ERISA's fiduciary standards to Lockheed's design of its pension plan is contrary to the language and purpose of ERISA, contrary to the decisions of other courts of appeals, contrary to basic trust law principles, and inconsistent with prior decisions of the Court. ERISA's fiduciary standards apply only to the administration of a plan by the plan's fiduciaries, not to the employer's design of the plan. When an employer establishes or amends a pension plan, it acts, not as a plan fiduciary, but as the plan's settlor.

Congress, the Treasury Department, and the courts have all approved the widespread practice of offering early retirement benefits in exchange for a release or other resolution of claims against the employer. The Older Workers Benefit Protection Act shows that Congress intended to permit employers to require an employee to execute a release as a condition of receiving early retirement benefits. Treasury Department regulations recognize that pension plans may condition the receipt of benefits on the execution of a release. Other courts of appeal have upheld the validity of releases in exchange for enhanced retirement and other benefits under employee benefit plans.

Moreover, because the advantages that Lockheed derived from the releases in this case are not distinguishable from many other advantages that employers routinely receive from the employee benefit plans that they sponsor, the decision below creates uncertainty about the lawfulness of many other

conventional employment practices. Thus, the court of appeals' decision should be reversed in order to establish the lawfulness of a wide array of commonplace employee benefit arrangements entered into by employers and employees throughout the country.

ARGUMENT

I. The Decision Below Improperly Applied ERISA's Fiduciary Standards To A Plan Sponsor's Design Of An Employee Benefit Plan.

A. ERISA's Fiduciary Duty Standards Govern The Conduct Of Plan Fiduciaries.

The court of appeals held that because Lockheed derived "significant" benefits from the releases that the plan required of those electing enhanced retirement benefits, Lockheed violated section 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D), which prohibits a fiduciary from causing a plan to engage in a transaction if he or she knows or should know that the transaction "constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan . . . ." *Spink v. Lockheed Corp.*, 60 F.3d 616, 623-24 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 806 (1996).

However, section 406(a)(1) prohibits only transactions involving plan *fiduciaries*. Section 406(a)(1) provides that "a fiduciary" shall not cause a plan to engage in certain prohibited transactions. Thus, section 406(a)(1) applies only if "a fiduciary" causes the transaction in question to occur. If

Lockheed did not act as a fiduciary when it amended its pension plan, it could not have violated section 406(a)(1).

B. Lockheed Did Not Act As A Fiduciary When It Amended Its Pension Plan.

In fact, the court of appeals did not find, and could not have found, that Lockheed acted as a fiduciary when it amended the plan, in light of the well established rule that an employer does not act as a fiduciary when it acts to establish, amend, or terminate a plan. All of the courts of appeals that have considered the matter have distinguished between plan administration, to which ERISA's fiduciary duties apply, and plan design, which is reserved to the employer in its capacity as settlor and is not subject to the fiduciary duties that apply to plan administration.[2]

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[2] *See, e.g.*, *Akers v. Palmer*, 71 F.3d 226, 230 (6th Cir. 1995) ("a company is only subject to fiduciary restrictions when managing a plan according to its terms, but not when it decides what those terms are to be"); *Siskind v. Sperry Retirement Program*, 47 F.3d 498, 505 (2d Cir. 1995) ("An employer that designs [an early retirement] plan or amends an existing plan's design does not come within ERISA's definition of a fiduciary"); *Malia v. General Elec. Co.*, 23 F.3d 828, 833 (3d Cir.), *cert. denied*, 115 S. Ct. 377 (1994) (roles of plan administrator and plan sponsor are distinct); *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994) (when amending a plan, an employer does not act as a fiduciary); *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986) (ERISA allows an employer-administrator "to wear 'two hats,'" assuming fiduciary duties only when and to the extent it acts as plan administrator, not when, *e.g.*, amending a plan); *Trenton v, Scott Paper Co.*, 832 F.2d 806, 808-09 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988) (design of early retirement plan "was purely a corporate management decision").

For example, in *Milwaukee Area Joint Apprenticeship Training Comm. v. Howell*, 67 F.3d 1333 (7th Cir. 1995), the Seventh Circuit considered the lawfulness of a scholarship loan agreement under which an ERISA-governed apprenticeship training fund made a loan to an apprentice. Under the loan agreement, the apprentice was required to repay the loan only if he worked for a non-contributing employer within the electrical industry. If he worked for a contributing employer, or if he left the electrical industry altogether, he was not required to repay the loan. These conditions obviously were designed to benefit the contributing employers.

After the district court held that the loan program violated ERISA (on the theory that the loan terms impermissibly benefited contributing employers), the Seventh Circuit reversed on the ground that the district court had

> failed to recognize the distinction between the scope of fiduciary duties owed during plan administration and the lack of fiduciary duties owed during plan design or amendment.
>
> . . . As this Circuit has previously noted, it would contravene Congress's intent for this Court to dictate the content of a welfare benefit plan. As such, this Circuit has held that "an employer unilaterally may change or abolish [a welfare benefit plan] without violating ERISA."

67 F.3d at 1338 (citations omitted).[3]

[3] Apprenticeship and training programs are classified as welfare plans under ERISA. ERISA's fiduciary duty provisions apply to both welfare (continued...)

This well accepted view is compelled by ERISA's definition of a "fiduciary," which provides, in general, that a person is a fiduciary of a plan only "to the extent" that he or she has control or authority over "management" or "administration" of the plan or "management or disposition of its assets." ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Because Lockheed was not engaged in the management or administration of the plan or its assets when it amended the plan, it was not acting as a fiduciary and could not possibly have violated section 406(a)(1)(D).

The court of appeals argued that because section 406(a)(1)(D) "would clearly forbid Lockheed from writing checks drawn on pension funds to buy the releases in question," 60 F.3d at 623, so too section 406(a)(1)(D) must prohibit plan amendments that result in plan funds being used to buy releases. This facile argument is not only inconsistent with a literal reading of section 406(a)(1)(D) (which on its face applies only to fiduciaries), but also ignores the fact that Lockheed, like other employers, is free under ERISA to terminate its pension plan and thereafter to use the plan's surplus for any purpose the employer deems appropriate, including the purchase of releases.[4] The termination of a

[3](...continued)
plans and pension plans. *See* ERISA §§ 3(1), 401(a), 29 U.S.C. §§ 1002(1), 1101(a).

[4] *See, e.g., District 65, UAW v. Harper & Row, Publishers, Inc.*, 576 F. Supp. 1468, 1477-78 (S.D.N.Y. 1983); Letter from Hon. Dennis M. Kass, Ass't Sec'y Dept. of Labor, to Hon. Edward R. Roybal, Chairman, House Select Committee on Aging, *reprinted in* 13 BNA Pension Reporter 2080, 2081 (Nov. 18, 1986); Letter from Hon. Dennis M. Kass, Ass't Sec'y Dept. of Labor, to John N. Erlenborn, Chairman, Advisory Council on Employee Welfare & Pension Benefit Plans, *reprinted in* 13 BNA Pension Reporter 472 (Mar. 13, 1986).

pension plan and recovery of the plan's surplus assets by the employer are permissible under ERISA for the same reason that Lockheed's plan amendment is permissible: they involve questions of plan design, which are simply not governed by ERISA's fiduciary duties.

In *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), the Court recognized that ERISA's fiduciary duty provisions are not designed to regulate an employer's role as the settlor of pension and welfare benefit plans. The Court distinguished the role of a plan's fiduciaries from the role of the collective-bargaining representatives of employers and unions in designing the plan, and ruled that while the plan's fiduciaries owe a duty of loyalty to the plan's beneficiaries, the collective-bargaining representatives are expected, in bargaining over the design of the plan, to advance the interests of the parties they represent:

> The duties of an employer-appointed trustee of an employee benefit trust fund, under § 302(c)(5) of the Act, under principles long ago developed in the courts of chancery, and under the specific provisions of ERISA, are totally alien to both of these activities [of employer-representatives in collective bargaining].

453 U.S. at 338.

Similarly, last Term, in *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223, 1228 (1995), the Court recognized that an employer does not act as a fiduciary when it amends or terminates an ERISA-governed plan in a nonunion context:

> Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans. See *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 947 (CA6 1990) ("[A] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan").

Regardless of whether its employees are represented by a union, the employer acts to advance its own interests when it designs an employee benefit plan for its employees; it does not act, and ERISA does not require it to act, as a fiduciary. In acting as settlor, the employer must be "completely faithful to [its own] interests." *Amax Coal Co., supra,* 453 U.S. at 327. *See also Curtiss-Wright Corp., supra,* 115 S. Ct. at 1230 (1995) (sharply distinguishing the process of amending the plan from the process of administering the plan).[5]

The error of the court of appeals' decision is illustrated by the following example. Suppose that Lockheed had spun off part of its existing pension plan into a new pension plan with enhanced benefits for employees who had previously released Lockheed from liability for its past conduct. Since the employees participating in the spun-off plan would receive enhanced benefits from the plan, ERISA would not give them any basis for complaining about the design of the spun-off plan. Nonparticipating employees would have no basis for complaint either, since the fiduciaries of the spun-off plan would owe a duty only to that plan's participants and beneficiaries. The employees who continued to participate in

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[5] *See also infra* p. 27 (an employer realizes advantages from an early retirement incentive plan that does not require employees to execute a release).

Lockheed's existing plan (and who were not covered by the spun-off plan) could not complain about the spinoff as long as the spinoff complied with the ERISA rules governing plan spinoffs,[6] because "ERISA's fiduciary principles protect employees' claims to accrued benefits, not their ownership of pension fund assets." *Hickerson v. Velsicol Chemical Corp.*, 778 F.2d 365, 374 (7th Cir. 1985), *cert. denied*, 479 U.S. 815 (1986); *see also Bigger v. American Commercial Lines, Inc.*, 862 F.2d 1341, 1344 (8th Cir. 1988) (although allocation of a plan's excess assets to a spun-off plan would benefit the sponsor of the spun-off plan, ERISA's fiduciary standards do not give employees a basis to complain about it); *Dougherty v. Chrysler Motors Corp.*, 840 F.2d 2, 4 (6th Cir. 1988) (same); *Foster Medical Corp. Employees' Pension Plan v. Healthco, Inc.*, 753 F.2d 194 (1st Cir. 1985) (same).

The fact that Lockheed provided enhanced benefits by amending an existing plan, rather than by spinning off a portion of its existing plan, does not change the result. In each case, ERISA's fiduciary standards simply do not apply. As the Sixth Circuit has observed:

> The language of ERISA stating that "the assets of a plan shall never inure to the benefit of any employer" cannot be read as a prohibition against any decisions of an employer with respect to a pension plan which have the obvious primary purpose and effect of benefitting the employees, and in addition the incidental side effect of being prudent from the employer's economic perspective. As the legislative history makes clear, ERISA recognizes the inherent tension between the desire that employees retire with

[6] *See* ERISA § 208, 29 U.S.C. § 1058.

> adequate retirement income and the practical internal pressures exerted on the trustees charged with preserving the assets of the pension fund. While ERISA resolves this conflict resoundingly on the side of the employees, Congress did not intend the Act to penalize employers for exercising their discretion to make rational economic decisions which are both in the best interests of the preservation of the fund and which are also not adverse to the employer's interests.

Holliday v. Xerox Corp., 732 F.2d 548, 551-52 (6th Cir.), *cert. denied*, 469 U.S. 917 (1984).[7]

[7] *Holliday* involved an employer's decision to transfer the assets allocable to certain participants from one account in the employer's pension plan to another account. The retirement benefits payable out of the *transferee account* were subtracted as a set-off in calculating the amount of benefits to which each employee was entitled under the employer's new guaranteed minimum pension plan. Because the retirement benefits payable out of the *transferor account* were not taken into account in calculating the employee's benefit under the new guaranteed minimum pension plan, plaintiffs claimed that the transfer and subsequent use of the transferred funds as a set-off violated ERISA's prohibition against the reversion of plan assets to the employer prior to the termination of the plan. The court rejected this claim on the ground that ERISA does not prohibit a pension plan from providing benefits to employees in a fashion that also benefits the employer. *See also United Steelworkers of America v. Cyclops Corp.*, 860 F.2d 189, 200-01 (6th Cir. 1988) (spinoff of part of pension plan is not a breach of fiduciary duty, regardless of benefit to employer).

C. ERISA's Fiduciary Duty Provisions Were Designed To Protect Employee Benefit Plans From Abuses In The Management Of Plan Assets, Not To Regulate The Design Of Employee Benefit Plans.

As the Court has recognized, ERISA's fiduciary standards are based on trust law principles and should be interpreted in accordance with those principles:

> ERISA abounds with the language and terminology of trust law. *See, e.g.*, 29 U.S.C. §§ 1002(7) ("participant"), 1002(8) ("beneficiary"), 1002(21)(A) ("fiduciary"), 1103(a) ("trustee"), 1104 ("fiduciary duties"). ERISA's legislative history confirms that the Act's fiduciary responsibility provisions, 29 U.S.C. §§ 1101-1114, "codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." H.R. Rep. No. 93-533, p. 11 (1973). Given this language and history, we have held that courts are to develop a "federal common law of rights and obligations under ERISA-regulated plans." *Pilot Life Ins. Co. v. Dedeaux*, [481 U.S. 41,] 56. *See also Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24, n. 26 (1983) ("'[A] body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans'") (quoting 129 Cong. Rec. 29942 (1974) (remarks of Sen. Javits)). In determining the appropriate standard of review for actions under § 1132(a)(1)(B), we are guided by principles of trust law. *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985).

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110-11 (1989); *see also Mertens v. Hewitt Associates*, 113 S. Ct. 2063, 2068 (1993) (ERISA's roots are in the common law of trusts).

Under basic trust law principles, "settlors generally are uninhibited in crafting original trust instruments or permitted amendments." *Sinai Hosp. of Baltimore, Inc. v. Nat'l Ben. Fund*, 697 F.2d 562, 568 (4th Cir. 1982) (citing authorities). Only last Term, the Court applied basic trust law principles to conclude that an employee benefit plan met ERISA's requirement that a plan contain an amendment procedure. In *Curtiss-Wright Corp., supra,* the Court relied on trust law to find that the ERISA requirement for having a plan amendment procedure was met by reference to corporate law:

> In order for an amendment procedure that says the plan may be amended by "[t]he Company" to make any sense, there must be some way of determining what it means for "[t]he Company" to make a decision to amend or, in the language of trust law, to "sufficiently manifest [its] intention" to amend. Restatement (Second) of Trusts § 331, Comment *c* (1957). . . . [P]rinciples of corporate law provide a ready-made set of rules for determining, in whatever context, who has authority to make decisions on behalf of a company.

115 S. Ct. at 1229; *see also id.* at 1230 ("for a plan *not* to have [an amendment] procedure would risk rendering the plan forever unamendable under standard trust law principles").

Curtiss-Wright Corp. supports the view that, in fixing the terms of an employee benefit plan, a corporation must act, not in accordance with ERISA's fiduciary standards (which, under

trust law, do not apply to the trust's settlor), but in accordance with corporate law standards (under which a corporation acts to advance the interests of its shareholders).[8] Consistent with this view, the prohibited transaction provisions of ERISA were designed to protect a plan from being damaged by abuses by fiduciaries in the management of plan assets, not to influence plan design or to curb the distribution of plan benefits.[9] There is no basis in the text, purpose, or legislative history of the statute for concluding that Lockheed's amendment of its plan to provide enhanced retirement benefits violated section 406(a)(1)(D).

As the First Circuit stated in *Kwatcher v. Massachusetts Serv. Emp. Pension Fund*, 879 F.2d 957, 960-61 (1st Cir. 1989):

> ERISA's framers were concerned that employers would exploit, misuse, or loot the huge reserves of funds collected for employee benefit plans. *See, e.g.*, 29

[8] *See generally* FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 837.50 *et seq.* (1994 Rev. Vol.).

[9] *See Commissioner v. Keystone Consol. Indus.*, 113 S. Ct. 2006, 2012 (1993) ("Congress' goal was to bar categorically a transaction that was likely to injure the pension plan."); *Milwaukee Area Joint Apprenticeship Training Comm., supra*, 67 F.3d at 1338 (Congress did not intend ERISA's fiduciary responsibility provisions to dictate the terms of a plan); H.R. Rep. No. 1280, 93d Cong., 2d Sess. 306 (1974) ("Under the labor provisions (title I), *the fiduciary is the main focus of the prohibited transaction rules*.") (emphasis added); S. Rep. No. 383, 93d Cong., 1st Sess. 99 (1973) ("To prevent discrimination against fiduciaries and parties in interest, the bill permits these persons to receive any benefits to which they are entitled as participants or beneficiaries in the plan."); H.R. Rep. No. 533, 93d Cong., 1st Sess. 7, 11-13, 21 (1973) (fiduciary responsibility provisions are concerned with plan administration and operation).

> U.S.C. § 1001(a) (congressional finding that "owing to the inadequacy of current minimum standards, the soundness and stability of plans . . . may be endangered"); H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4681 (noting continued "abuses in the administration of pension plans and in the handling of pension funds"); S. Rep. No. 383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4892 (similar); *id.* 4903 (acknowledging need "for more effective remedies to prevent misuse of pension funds to the detriment of . . . participating employees").[10]

The legislative history contains not the slightest suggestion that ERISA's prohibited transaction provisions were intended to govern the terms of the plan itself. *See White v. Distributors Ass'n Warehousemen's Pension Trust*, 751 F.2d 1068, 1070-72 (9th Cir. 1985) (ERISA not intended to impose fiduciary duties on parties to collective bargaining agreements who design a benefit plan).[11]

[10] *See also Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142-43 (1985) (principal statutory duties relate to the management of plan assets, maintenance of records, disclosure of information, and avoidance of conflicts of interest).

[11] Other provisions of ERISA explicitly regulate the content of a pension plan. *See, e.g.*, ERISA §§ 202-06, 402, 29 U.S.C. §§ 1052-56, 1102. Under those provisions an employer could not, for example, condition an employee's ability to receive retirement benefits that he or she had *already earned* on the employee's execution of a release; the introduction of such a condition would violate ERISA's vesting and benefit accrual rules. *See* ERISA §§ 203(c)(1)(A), 204(g), 29 U.S.C. §§ 1053(c)(1)(A), 1054(g). By contrast, there is nothing in § 406(a) of

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II. The Decision Below Is Irreconcilably In Conflict With The Actions Of Congress, The Treasury Department, And The Courts That Uphold The Widespread Practice Of Offering Early Retirement Benefits In Exchange For A Release Or Other Resolution Of Claims Against An Employer.

A. The Practice Of Offering Early Retirement Incentive Benefits In Exchange For A Release Is Widespread.

During the 1980's and 1990's, international competitive pressures, technological changes, and down-turns in economic activity have forced many large U.S. employers to make substantial reductions in their workforces. Downsizing is not limited to employers whose overall business is temporarily or permanently contracting, however. Even an employer whose overall business and workforce are growing might need to reduce particular divisions or job categories in its workforce in response to competitive pressures, changing markets, or technological change.

Faced with the need to downsize some or all of its workforce, an employer has two general choices: it can downsize through voluntary incentives, such as early retirement window programs, or through involuntary measures, such as layoffs. Employers and employees generally prefer a voluntary program to the drastic approach of simply firing large numbers of employees.

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[11](...continued)
ERISA or its legislative history that suggests that § 406(a) was intended to govern the design of an employee benefit plan.

An involuntary program could well lead to the layoff of many employees who wish to continue working, yet leave in place other employees who are on the verge of leaving anyway, either for retirement or alternative employment. By contrast, a voluntary program allows eligible employees to decide for themselves whether they wish to continue working for the company or to leave the company with enhanced benefits. Moreover, in many cases a voluntary program permits an employee to retire early with benefits that are comparable to or better than the benefits the employee would receive if he or she continued to work and retired several years later. Voluntary programs thus provide opportunities and benefits that generally are not available under involuntary programs.

Offering employees a special additional incentive to retire voluntarily during a designated period of time (often referred to as an "early retirement window") can reduce and sometimes eliminate the need for involuntary reductions-in-force and create opportunities for younger employees.[12] The use of early retirement incentives "is a common corporate practice utilized to prevent individual hardship. It is a humane practice well accepted by both employers and employees . . . ." *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 344 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983).[13]

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[12] HEWITT ASSOCIATES, PLAN DESIGN AND EXPERIENCE IN EARLY RETIREMENT WINDOWS AND IN OTHER VOLUNTARY SEPARATION PLANS 5 (1986).

[13] "Provided the employee may decline the offer and keep working under lawful conditions, the offer [of enhanced early retirement benefits] makes him better off. He has an additional option, one that may be . . . worth a good deal of money. He may retire, receive the value of the package, and either take a new job (increasing his income) or enjoy new
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The use of releases in connection with early retirement incentive programs is widespread. "About 80 percent of *Fortune* 100 companies sponsored an exit incentive program at least once during 1979 through 1988 . . . about 55 percent of a sample of large companies (25,000 or more employees) offered such programs at least once between 1981 and 1985." U.S. GENERAL ACCOUNTING OFFICE, AGE DISCRIMINATION: USE OF WAIVERS BY LARGE COMPANIES OFFERING EXIT INCENTIVES TO EMPLOYEES 2 (Apr. 1989) (footnote omitted) ("1989 GAO Report"). In fact, for some employers, early retirement incentives are a routine way to thin the ranks of their employees. The 1989 GAO Report's survey of *Fortune* 100 companies found that 80 percent of those companies sponsored an exit incentive program at least once between 1979 and 1988, and that about 61 percent did so more than once. *Id.* at 4.[14]

The use of early retirement incentive plans has not abated since the 1989 GAO Report. A 1994 survey report by The Wyatt Company found that of the 388 companies with defined benefit pension plans that responded to the survey, 27 percent had offered at least one early retirement incentive plan between 1991 and 1993 and that, of the companies offering

[13](...continued)
leisure." *Henn v. National Geographic Soc'y*, 819 F.2d 824, 826 (7th Cir. 1987). *See also* S. Rep. No. 263, 101st Cong., 2d Sess. 52 (1990) ("Early retirement incentive plans are extremely popular with older workers. Moreover, they benefit the entire workforce to the extent that sufficient voluntary retirements avoid the need for involuntary layoffs . . . .").

[14] In 1992, the Internal Revenue Service, in response to requests from major employers, ruled that, in appropriate circumstances, an employer may make repeated offerings of early retirement incentive benefits without causing those benefits to become a permanent feature of the employer's pension plan. *See* Rev. Rul. 92-66, 1992-1 C.B. 92.

early retirement incentive plans, 20 percent offered more than one plan during the 1991-1993 period. THE WYATT COMPANY, SURVEY REPORT: DESIGNING AN EFFECTIVE EARLY RETIREMENT WINDOW 2 (1994).[15]

Many employers offering early retirement incentive plans require eligible employees to waive employment-related claims as a condition of receiving enhanced retirement benefits. The 1989 GAO Report found that about 30 percent of the *Fortune* 100 companies that sponsored an exit incentive program required employees to sign a waiver in order to receive enhanced benefits. 1989 GAO Report 2. Another study found that about 25 percent of the companies with early retirement incentive programs required releases as a condition of receiving enhanced benefits. Grant, *The "Open Window" — Special Early Retirement Plans in Transition*, 16 EMPLOYEE BENEFITS JOURNAL 10, 15 (1991).

B. When It Enacted The Older Workers Benefit Protection Act, Congress Explicitly Sanctioned The Practice Of Offering Exit Incentive Benefits To Employees Who Execute Releases.

Congress has approved the practice of offering exit incentive benefits to employees who execute releases. The Older Workers Benefit Protection Act of 1990, Pub. L. No.

[15] "The number of companies [participating in the survey] offering windows rose steadily from 22 (roughly 4% of all respondents) in 1989 to 59 (slightly more than 11%) in 1992." TOWERS, PERRIN, FORSTER & CROSBY, INC., MONITOR (SEPT. 1922). *See also* HEWITT ASSOCIATES, EARLY RETIREMENT WINDOWS, LUMP SUM OPTIONS, AND POSTRETIREMENT INCREASES IN PENSION PLANS 1 (1992) ("Hardly a week passes without mention in the popular press of another company offering an early retirement window program.").

101-433, 104 Stat. 978 ("OWBPA"), provides that it is not a violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, for the employer to observe the terms of a "voluntary early retirement incentive plan" if the plan is "consistent with the relevant purpose or purposes of this Act." OWBPA, § 103, amending 29 U.S.C. § 623(f)(2). In addition, the OWBPA recognizes that a release or waiver may be given "in connection with an exit incentive or other employment termination program offered to a group or class of employees," and specifies the standards that a waiver must meet in these circumstances in order to be enforceable. *See* OWBPA § 201, amending 29 U.S.C. § 626(f)(1).[16]

The OWBPA thus shows that Congress intended to permit employers to require a waiver of ADEA claims as a condition of receiving early retirement benefits, and neither the OWBPA nor its legislative history contains the slightest suggestion that a waiver under an early retirement incentive plan violates ERISA. This certainly was not because Congress had forgotten about ERISA; the OWBPA provisions governing early retirement benefits refer specifically to ERISA. *See* OWBPA § 103, amending 29 U.S.C. § 623(*l*)(1).

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[16] "S. 1511 permits early retirement incentive plans that are both truly voluntary and consistent with the relevant purpose or purposes of the ADEA. . . . In addition, if a waiver is requested from a group of employees as part of an exit incentive program, the following additional procedural requirements must be met: the employer must provide specific information about the eligibility factors for inclusion of individuals in the program and the age profiles of individuals who are included in and excluded from the program." 136 Cong. Rec. H8618-19 (daily ed. Oct. 2, 1990) (Explanation of S. 1511).

It is implausible that when it enacted the OWBPA to regulate the practice of requiring a waiver of ADEA claims as a condition of receiving enhanced early retirement benefits, Congress was approving a practice that was prohibited by ERISA.[17]

C. Treasury Department Regulations Approve The Practice Of Granting Enhanced Retirement Benefits To Employees Who Execute Releases.

Treasury Department regulations recognize that pension plans may condition the receipt of benefits on covenants not to compete and on waivers as long as the Internal Revenue Code's nondiscrimination standards are met and the provision does not cause an employee to lose vested benefits.[18] The Treasury Department's views are entitled to deference and dictate reversal of the court of appeals' decision, which failed even to refer to the Treasury Department's regulations.[19]

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[17] *See also infra* pp. 25-26 (pension benefits may be used to offset employer's obligation under Davis-Bacon Act).

[18] *See* Treas. Reg. §§ 1.411(a)-4(c), Example (1), 1.401(a)(4)-4(b)(2)(ii)(B); Temp. Treas. Reg. § 1.411(a)-4T(c), Example (1); *see also* Treas. Reg. § 1.401(a)(4)-3(f)(4)(ii)(A) & (D) (relying on § 1.401(a)(4)-4(b)(2) for purposes of applying the nondiscrimination standards to an early retirement window plan). In addition, the Internal Revenue Service has ruled that a prohibited transaction does not occur merely because a funded pension plan is amended to assume responsibility for benefits previously paid from the employer's general assets. *See* Tech. Adv. Mem. 9516005 (Dec. 22, 1994).

[19] ERISA's prohibited transaction provisions appear in both Title I and Title II of ERISA. The Department of Labor is principally responsible for the administration of the Title I provisions, while the Treasury

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The Treasury's regulations would be meaningless if ERISA prohibited an employer from amending a plan to impose a waiver requirement. It is implausible, to say the least, that this expert federal agency, which is responsible for the administration of the ERISA provisions that appear in the Internal Revenue Code, would have issued regulations that explicitly sanction a practice that ERISA forbids.

D. Other Appellate Courts Have Upheld Releases And Settlements In Which Employer Liability For Various Claims Is Reduced Or Eliminated In Exchange For Enhanced Retirement Benefits.

The court of appeals' opinion fails to recognize that other courts have upheld the validity of releases given in exchange for enhanced retirement and other benefits under employee benefit plans.[20] These cases contain not the slightest suggestion that the releases violated ERISA.

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[19](...continued)
Department is principally responsible for the administration of the Title II provisions. The standards of conduct established by the two sets of prohibited transaction provisions are nearly identical. *Compare* ERISA §§ 406-08, 29 U.S.C. §§ 1106-08, *with* Int. Rev. Code § 4975. *See generally* H.R. Rep. No. 1280, *supra*, 306-323 (explaining the operation of the Title I and Title II provisions); Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713 (Oct. 17, 1978) (recognizing overlap of Labor and Treasury responsibilities).

[20] *See, e.g.*, *Blistein v. St. John's College*, No. 94-2223, 1996 WL 30672 (4th Cir. Jan. 26, 1996); *Astor v. International Business Machines Corp.*, 7 F.3d 533 (6th Cir. 1993); *Cirillo v. ARCO Chemical Co.*, 862 F.2d 448 (3d Cir. 1988).

The decisions in these cases would be pointless if the releases violated ERISA.[21] The decision below is thus incompatible with a sound body of law upholding the enforceability of releases given in exchange for additional benefits under ERISA-governed plans.

E. Settlements Of And Judgments In Age Discrimination Lawsuits, Including Suits Filed By The EEOC, Frequently Require An Employer To Amend Its Pension Plan To Provide Enhanced Benefits To Resolve The Claims Against The Employer.

Settlements of and judgments in age discrimination lawsuits, including suits filed by the Equal Employment Opportunity Commission ("EEOC"), frequently require defendant employers to amend their pension plans to provide enhanced benefits in exchange for the plaintiffs dropping their claims for monetary damages or agreeing to accept reduced payments directly from the defendant employer.[22] Here too.

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[21] The fact that ERISA regulates employee benefit plans is hardly an obscure or subtle point. The plaintiffs in *Astor*, *supra*, sued under ERISA, and the court emphasized that the plan was governed by ERISA. 7 F.3d at 534, 536-37.

[22] *See, e.g.*, 150 BNA Daily Labor Reporter at A-3 (Aug. 4, 1995) (consent decree in *EEOC v. McDonnell Douglas Corp.*, No. 4:93-CV-526 (E.D. Mo)); *see also* Priv. Ltr. Rul. 8536064 (June 12, 1985) (additional pension benefits provided as part of settlement of class action challenging termination of health benefits).

The EEOC Compliance Manual, a compilation of instructions, legal interpretations, and policy guidance provided to agency staff, contains statements that confirm the view that the EEOC routinely enters into settlement agreements that discharge the employer from further liability in

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under the rationale of the court of appeals, these are prohibited transactions akin to an employer's writing checks on a pension fund in order to settle lawsuits. There is no evidence to suggest that ERISA was intended to bar these judgments and settlements.

III. Because The Advantages That Lockheed Derived From The Releases Are Not Distinguishable From Many Other Advantages That Employers Routinely Receive From Employee Benefit Plans, The Decision Below Is Inconsistent With The Lawfulness Of Many Other Widespread Employment Practices.

In holding that Lockheed violated section 406(a)(1)(D) of ERISA because Lockheed derived "significant" benefits from the releases, the court of appeals failed to recognize that the advantages Lockheed derived from its early retirement program are no different from many advantages that employers routinely derive from early retirement incentive offerings with no release requirement, as well as a myriad of other employee benefit plans. The availability of such advantages is a principal reason employers establish such

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[22](...continued)
exchange for benefits to employees or former employees that are paid from qualified plans sponsored by the employer. *See, e.g.*, EEOC Compliance Manual, § 627.2, CCH ¶ 4902 at 4064 (quoting with approval case law indicating that a back pay award should include an increase in pension benefits to reflect the higher rate of pay the individuals would have received but for the discriminatory conduct). *Id.* at § 801, *n.*11, CCH ¶ 6519 at 5084 ("In determining a front pay award, the Commission believes that in addition to lost earnings, the entire employee benefit package should be considered"). *Id.* at §§ 1180 *et seq.*, CCH ¶¶ 7701 *et seq.* (addressing remedies to be used when pension and other benefit plans have improperly used gender-based actuarial tables).

plans,[23] and there is no reason to believe that Congress intended such advantages to violate ERISA.

Any special early retirement program, with or without a release requirement, "benefits" the employer by reducing payroll and other expenses attributable to active employees. Without that "benefit," employers would have no incentive to offer special early retirement programs. Similarly, employers negotiating with trade unions frequently reach agreements in which the *quid pro quo* for enhanced retirement benefits is lesser wage increases, outright wage reductions, or other changes in the conditions of employment that benefit the employer. Although such agreements obviously benefit the employer (for example, by reducing wage costs or at least minimizing wage increases), no court or government agency has ever suggested, or reasonably could suggest, that a negotiated exchange of enhanced retirement benefits for reduced wage costs violates ERISA.

Similarly, a government contractor may offset its prevailing wage obligation under the Davis-Bacon Act with any pension benefits it provides to its employees under an ERISA-governed plan.[24] This use of pension assets provides a benefit to the contractor that is every bit as substantial and direct as the benefits Lockheed received from the releases in

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[23] ERISA neither requires an employer to adopt an employee benefit plan nor dictates the level of benefits that a plan must provide. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511-12 (1981); H.R. Rep. No. 533, 93d Cong., 1st Sess. 2 (1973).

[24] *See* 40 U.S.C. § 267a(b); 29 C.F.R. § 5.31 (1995); U.S. Treas. Dep't, Study of the Effect of the Minimum Participation Requirements on Government Contractors 2-6 (March 1991).

this case. The court of appeals' decision simply cannot be reconciled with the congressionally approved practice of using pension benefits to offset a contractor's prevailing wage obligation under the Davis-Bacon Act.

Some employers allow employees to participate in a pension plan only if they agree in exchange to reduce their cash compensation. By striking such a bargain, the employer reduces its wage costs, and employees obtain retirement benefits. It has never been suggested that such arrangements are unlawful and, indeed, they are expressly recognized by Treasury Department regulations. *See* Treas. Reg. § 1.401(k)-1(a)(3)(iv) (excluding from the definition of a "cash or deferred election" a one-time irrevocable election to receive contributions or benefit accruals under a pension plan); *see also* IRS Announcement 94-101, § 441.1, 1994-35 I.R.B. 53.[25]

Even where there is no explicit increase in pension benefits in exchange for a reduction in pay, such trade-offs are often made implicitly. Employers attract and retain employees on the basis of their total offerings of compensation and benefits. For example, an employer might find it cost-

[25] Both the wage-reduction arrangement permitted by Treasury Department regulations and Lockheed's early retirement incentive plan are quite different from a hypothetical arrangement one might imagine in which an employer offers additional benefits to employees who agree to remit a percentage of the additional benefits to the employer. Wage-reduction and early retirement incentive plans provide genuine pension benefits to employees. By contrast, the hypothetical benefit pass-through arrangement requires the employee to act as a conduit for the payments to be remitted to the employer; although the hypothetical employer might attempt to characterize the payments as pension benefits, the plan would, in substance, be making these payments to the employer, not to the employee.

effective to offer employees above-average retirement benefits together with below-average current compensation. In these circumstances, the employer derives a monetary benefit from its retirement plan that is no less significant or direct than the benefits Lockheed derived from the releases in this case.[26]

Likewise employers that offer early retirement incentive plans without seeking releases from their employees benefit from the resulting reductions in wage and benefit costs. Such benefits have never been found to violate ERISA even though they are plainly designed to serve the employer's business needs by reducing employee headcount.[27]

Some exit incentive programs offer severance benefits and retiree health benefits through a trust similar to a pension trust.[28] Because severance and retiree health plans are

[26] *See generally* RONALD G. EHRENBERG AND ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 394-406 (3d ed. 1988); ALICIA H. MUNNELL, THE ECONOMICS OF PRIVATE PENSIONS 3 (1982).

[27] *See, e.g.*, *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283-84 (3d Cir. 1988); *Trenton v. Scott Paper Co.*, *supra*, 832 F.2d at 808-09. Similarly, some employers offer early retirement incentive benefits only to employees who agree to work until a specified future retirement date. These employers directly benefit both from the additional services rendered by the participating employees and from the reduction in payroll costs incident to the employees' retirement.

[28] *See* 29 U.S.C. § 623(*l*)(2) (recognizing that exit incentive programs provide retiree health and severance benefits); Int. Rev. Code § 501(c)(9) (tax exemption for a voluntary employees' beneficiary association [a "VEBA"]); Treas. Reg. § 1.501(c)(9)-3(c), (d), (e) (permitting a VEBA to provide severance benefits and health benefits); *see also* Int. Rev. Code § 419A(c)(2), (3) (reserves for severance and retiree health benefits).

governed by ERISA's fiduciary responsibility provisions,[29] the court of appeals' decision applies to exit incentive plans that offer severance and retiree health benefits. According to the court of appeals' decision, an employer engages in a prohibited transaction if it uses a trust fund to provide severance or retiree medical benefits to employees who agree to terminate employment and execute a release.

In sum, the benefits Lockheed derived from its plan amendment do not differ in degree or in kind from the benefits enjoyed by employers under many commonplace arrangements. Unless ERISA has, for over 20 years and unbeknownst to Congress, employers, unions, and government agencies, outlawed countless traditional employment arrangements that employers, unions, and employees rely on every day, the court of appeals' decision must be reversed.

[29] *See* ERISA § 401(a), 29 U.S.C. § 1101(a).

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to reverse the court of appeals' decision.

Respectfully submitted,

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